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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 HILLARY WALLS,

12 Plaintiff,

13 v.

14 PIERCE COUNTY SHERIFF'S
15 DEPARTMENT, *et al.*,

16 Defendants.

17 Case No. C07-5152RJB

18 **ORDER ADOPTING THE REPORT
19 AND RECOMMENDATION**

20 This case comes before the Court on U.S. Magistrate Judge Karen L. Strombom's Report
21 and Recommendation (Dkt. 32), Defendants' Motion for Summary Judgment (Dkt. 36), and
22 Plaintiff's Motion to Strike (Dkt. 43). The Court has considered the relevant documents and the
23 remainder of the file herein.

24 **I. FACTS**

25 Pro se Plaintiff, Hillary Walls, brought this civil rights action pursuant to 42 U.S.C. § 1983.
26 Dkt. 15. Plaintiff alleges that in 2002, Defendant McCarthy seized \$690.00 with a search warrant
27 that was based upon stale information. *Id.*, at 5. Plaintiff also alleges that Defendants McCarthy,
28 Adams, and Pastor unlawfully seized "lap tops, desk top computers and many other things." *Id.*
Plaintiff alleges that these items are not subject to civil or criminal forfeiture. *Id.* at 4. Plaintiff
alleges that he has attempted several times to get his property returned. *Id.* Plaintiff argues that

1 these seizures violated his constitutional rights and he was not afforded the “due process of law.” *Id.*
2 at 4.

3 The Report and Recommendation recommends that Defendants’ motion to dismiss the
4 amended complaint for failure to state a claim be granted. Dkt. 32. The Report and
5 Recommendation notes that Washington has a process in place for the return of property seized
6 during an unlawful search and seizure. Dkt. 32. Under Washington Criminal Rule 2.3(e),
7 “A person aggrieved by an unlawful search and seizure may move the court for the return of the
8 property on the ground that the property was illegally seized and that the person is lawfully entitled
9 to possession thereof. If the motion is granted the property shall be returned.” The Report and
10 Recommendation finds that Plaintiff has failed to show that Washington’s post-deprivation
11 procedure, for the return of property taken in an unlawful search and seizure, is constitutionally
12 inadequate. *Id.* It further recommends denial of Plaintiff’s motion to amend his complaint after
13 discovery is completed because amendment would be futile. *Id.* The Report and Recommendation
14 recommends dismissal of the action without prejudice so that Plaintiff can pursue his claims in state
15 court. *Id.*

16 Plaintiff argued, in his Objections, that he made a mistake when he alleged a Fourth
17 Amendment claim, but instead intended to make a Fourteenth Amendment claim. Dkt. 33. Plaintiff
18 argued that he filed a motion to amend his complaint once discovery was complete. Dkt. 33, at 1.
19 He argued that the Court did not address his motion. *Id.* Plaintiff includes 267 pages of attachments
20 to his pleadings. Dkt. 33-2 to 33-10. In response to Plaintiff’s Objections, Defendants request an
21 opportunity to further brief the Court. Dkt. 32.

22 On March 17, 2008, Plaintiff’s Fourth Amendment claim was dismissed. Dkt. 35. Pursuant
23 to Fed. R. Civ. P. 12 (b), and in light of the multiple pleadings Plaintiff submitted, this Court ordered
24 that the Motion to Dismiss be converted into a motion for summary judgment. *Id.* Defendants’
25 request for an opportunity to further brief the issues was granted, and each side was given an
26 opportunity to respond. *Id.* Defendants filed their response entitled “Motion for Summary
27 Judgment” (Dkt. 36) and Plaintiff filed his Response (Dkt. 43). Plaintiff again attaches 654 pages of
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1 exhibits without referencing any of them in his Response. Dkt. 43. The matter is now ripe for
2 review. For the reasons set forth below, the Report and Recommendation (Dkt. 32) should be
3 adopted, and the matter dismissed.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”); *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*). Conclusory, non

1 specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v.*
 2 *Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

3 **A. MOTION TO STRIKE**

4 Plaintiff moves to strike Defendants' response as untimely. Dkt. 43. Plaintiff's motion
 5 should be denied. The Court ordered Defendants to file a further pleading by April 1, 2008. Dkt.
 6 35. Defendants' filed their pleading on April 1, 2008. Dkt. 36. The fact that they entitled it
 7 "Motion for Summary Judgment" is immaterial as the Court had already converted Defendants'
 8 original Motion to Dismiss into a Summary Judgment Motion.

9 **B. STATUTE OF LIMITATIONS**

10 For actions under brought under 42 U.S.C. § 1983, like the one here, federal courts apply the
 11 forum state's statute of limitations, along with the forum state's law regarding tolling, including
 12 equitable tolling. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007). Under
 13 Washington law, the statue of limitations is three years for an action "for the taking, detaining, or
 14 injuring of personal property, including an action for the specific recovery thereof," and for an action
 15 "against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official
 16 capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment
 17 of money collected upon an execution." RCW 4.16.080 (2) and (5). RCW 4.16.190(1) tolls the
 18 running of the statute of limitations for the time an individual is "imprisoned on a criminal charge
 19 prior to sentencing."

20 This case was filed on March 27, 2007. Dkt. 1. Accordingly, unless tolled, the statute of
 21 limitations would have barred any case based on state action prior to March 26, 2004.

22 The record now contains several pleadings which list property taken from Plaintiff on several
 23 occasions. *See e.g.* Dkts. 39, 41, and 43. Various computers are listed. *See Id.* It is not clear
 24 which of these Plaintiff claims were not returned to him in violation of his rights. Plaintiff does
 25 attach Pierce County Sheriff Office Property Reports for the seizure of computer equipment taken on
 26 December 21, 2001 in Pierce County Superior Court ("PCSC") case number 01-270-0326. Dkt. 43-
 27 2, at 2. Plaintiff also attaches a property report for the seizure of \$690.00 from his inmate account

1 on March 18, 2003, in PCSC case number 03-105-0569. Dkt. 43-3, at 3. Defendants include in
2 their attachments a report that computer equipment was seized on from Plaintiff on October 3, 2002
3 in PCSC case number 02-242-0527. Dkt. 39, at 1.

4 Defendants provide evidence that from December 21, 2001 (the date of the first incident
5 where plaintiff alleges that his property was improperly taken) to March 27, 2007 (the date the case
6 was filed), Plaintiff was “imprisoned on a criminal charge prior to sentencing” for a total of 268 days.
7 Dkt. 37. Pursuant to RCW 4.16.190(1), then the events Plaintiff complains about would have had to
8 occur by July 2, 2003 for his claim to be viable. The most recent instance that Plaintiff complains
9 about is the March 18, 2003 seizure of \$690.00 from his inmate trust account. Plaintiff offers no
10 evidence to contradict Defendants’ submissions regarding the time he spent in custody which would
11 further toll the statute. Instead, Plaintiff argues that the statute could also be tolled if the defendant
12 misleads the plaintiff into allowing the period to expire or extraordinary circumstances beyond the
13 plaintiff’s control make it impossible for him to file suit on time. Dkt. 39. Plaintiff offers no
14 evidence that Defendants misled him into allowing the period to expire. He offers no evidence of
15 extraordinary circumstances which made it impossible for him to file suit. Plaintiff’s claims are
16 barred by the statute of limitations. Further, even if Plaintiff’s claims were not barred by the statute
17 of limitations, he has not shown that Washington’s procedures for a “person aggrieved by an
18 unlawful search and seizure” are constitutionally inadequate.

19 **C. FOURTEENTH AMENDMENT DUE PROCESS**

20 “To state a claim under § 1983 , a plaintiff must both (1) allege the deprivation of a right
21 secured by the federal Constitution or statutory law, and (2) allege that the deprivation was
22 committed by a person acting under color of state law.” *Anderson v. Warner*, 451 F.3d 1063, 1067
23 (9th Cir. 2006) (*internal citations omitted*).

24 Plaintiff has now submitted several pages of attachments. *See e.g.* Dkt. 33-2 to 33-10; Dkt.
25 39. Based upon these attachments, it appears that the items at issue here were taken pursuant to
26 search warrants, one for a residence, and the other seized the money in his inmate jail account. Dkt.
27 32-2, at 1-3. Further, it appears that the criminal cases for which this evidence was taken, were
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1 dismissed, or no charges were filed against Plaintiff. *Id.* It also appears that a portion of the \$690.00
2 was released to a third party. *Id.*, at 5.

3 The fact that a court authorized the Defendants to take these items calls into question the
4 application of *Hudson v. Palmer*, 468 U.S. 517, 533 (1983). *Zinermon v. Burch*, 494 U.S. 113,
5 128-130 (1979). The Court in *Hudson* held that “an unauthorized intentional deprivation of property
6 by a state employee does not constitute a violation of the procedural requirements of the Due
7 Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is
8 available.” *Id.* (*emphasis added*). *Hudson* represents a special case of the *Mathews v. Eldridge*, 424
9 U.S. 319, 335 (1976), analysis “in which postdeprivation tort remedies are all the process that is due,
10 simply because they are the only remedies the state could be expected to provide.” *Zinermon*, at 128
11 (noting that a state could not be expected to hold predeprivation hearings in circumstances where the
12 state actor is either negligent or acting without authority).

13 In determining what process is due Plaintiff for the return of his property here should be done
14 by applying the factors specified by the Supreme Court in *Mathews v. Eldridge*. *Id.* Those factors
15 are: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous
16 deprivation of such interest through the procedures used, and the probable value, if any, of additional
17 or substitute procedural safeguards; and 3) the Government's interest, including the function involved
18 and the fiscal and administrative burdens that the additional or substitute procedural requirement
19 would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

20 Washington law affords Plaintiff several avenues for the return of his property. One is a
21 court hearing under Washington Criminal Rule 2.3(e). Plaintiff makes no showing under the
22 *Mathews v. Eldridge* test that such a court hearing does not provide him adequate due process. It is
23 undisputed that he has a significant interest in his private property. However, a court hearing
24 provides the best protection against erroneous deprivation of that interest. Plaintiff does not show
25 that an order denying him the return of his property is not appealable to the Washington State Court
26 of Appeals. No further procedural requirements could be reasonably required. Further, even if as
27 Plaintiff alleges, his property is no longer available, he could still resort to state law causes of action
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such as conversion. Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). The Report and Recommendation should be adopted and the case should be dismissed.

III. ORDER

6 || Therefore, the Court does hereby find and **ORDER**:

- 7 (1) The Court **ADOPTS** the Report and Recommendation (Dkt. 32);
8 (2) Defendants' Motion for Summary Judgment (36) is **GRANTED**;
9 (3) Plaintiff's Motion to Strike (Dkt. 43) is **DENIED**;
10 (4) This case is **DISMISSED**; and
11 (5) The Clerk of the Court is directed to send copies of this Order to Plaintiff, all counsel
12 of record, and to the Hon. Karen L. Strombom.

13 || DATED this 11th day of April, 2008.


ROBERT J. BRYAN
United States District Judge